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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 84

JESSE TURNER,

Appellant,

v.

CITY OF MEMPHIS, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT, TENNESSEE, WESTERN DIVISION

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

Opinions Below

The per curiam opinion below is unreported but appears at pages A1-A3 of the Jurisdictional Statement.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1253, providing for direct appeals in cases required by Congress to be heard and determined by three judges. The order appealed from was entered below on February 10, 1961. Notice of appeal was filed in the District Court on March 1, 1961. The appeal docketed here on May 1, 1961. On October 9, 1961, this Court entered an order postponing consideration of the question of jurisdiction to the hearing on the merits and transferred case to summary calendar.

Constitutional Provisions, Statutes, Ordinances and Regulations Involved

This case involves the following provisions of the Tennessee Code relating to the Division of Hotel and Restaurant Inspection, Department of Conservation of the State of Tennessee:

> §53-2121—Rules and regulations authorized—Arbitration of inconsistencies.—The division is hereby authorized to make such rules and regulations, including a code of sanitation, as may be necessary to carry out the purpose of §§53-2101--53-2121 and to protect the public health and safety. In any instances where there is an inconsistency as between the requirements of the division and those of a local county, or city, health officer, such inconsistency is to be arbitrated by a three (3) man board consisting of the director, the local health officer concerned, and a third member to be chosen by these two. (Tenn. Code Ann. Vol. 9.) [1]

> §53-2120—Violation of regulations or provisions penalized.—Every owner, manager, proprietor, agent, lessee, or other person in charge of conducting any hotel or restaurant, who shall fail or refuse to comply with any of the provisions of §§53-2101--53-2121 or with the rules and regulations promulgated by the division, shall be deemed guilty of a misdemeanor, and shall be

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[1] This section was amended, effective February 18, 1961, to read as follows:

> "Rules and regulations authorized—The division is hereby authorized to make such rules and regulations as may be necessary pertaining to the safety and/or sanitation of hotels and restaurants in order to carry out the provisions of this chapter."

This amendment became effective after entry of the order of the court below.

> fined not less than ten dollars ($10.00) nor more than one hundred dollars ($100) for each offense, and each day after sufficient notice has been given shall constitute a separate offense. (Tenn. Code Ann. Vol. 9.)

Involved also is Regulation No. R-18(L), promulgated by the Division, which provides:

> Restaurants catering to both white and negro patrons *should* be arranged so that each race is properly segregated. Segregation will be considered proper where each race shall have separate entrances and separate facilities of every kind necessary to prevent patrons of the different races coming in contact with the other in entering, being served, or at any other time until they leave the premises. (Tennessee Laws, Rules and Regulations for Restaurants, Department of Conservation, Division of Hotel and Restaurant Inspection. Approved June 18, 1952, filed in Office of Secretary of State.) (Emphasis added.)[2]

This case also involves another provision of the Tennessee Code:

> §62-710—Right of owners to exclude persons from places of public accommodation.—The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is abrogated; and no keeper of any hotel, or public house, or carrier of

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[2] Regulation R-1 provides as follows:

"Definition of Terms.

* * *

(d) The term 'shall' as used in these regulations is mandatory.

(e) The term 'should' as used in these regulations indicates desirability.

* * *"

passengers for hire (except railways, street, interurban, and commercial) or conductors, drivers, or employees of such carrier or keeper, shall be bound, or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry, or admit to his house, hotel, vehicle, or means of transportation, or place of amusement; nor shall any right exist in favor of any such person so refused admission; the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, to be as complete as that of any private person over his private house, vehicle, or private theater, or places of amusement for his family. (Tenn. Code Ann. Vol. 11.)

The answer of appellee City of Memphis relied upon city ordinances as the basis for requiring segregation in restroom facilities in the airport. All parties agree that segregation is no longer enforced with respect to such facilities. However, the ordinances on which the City relied are set forth in the Jurisdictional Statement, Appendix B.

Question Presented

Whether the three-judge court below, in a case involving segregation of Negroes by the lessee of a municipally-owned airport restaurant, erroneously refused to issue a permanent injunction enjoining such segregation and incorrectly failed to exercise its jurisdiction, instead requiring appellant to file suit for declaratory judgment in the state

courts for interpretation of statutes, regulations and ordinances pleaded by appellees.

Statement of the Case

This suit for permanent injunction was instituted on April 1, 1960, by the appellant, Jesse Turner, who is an adult Negro citizen of the United States and of the State of Tennessee, residing in Memphis, Tenn. Appellant is the executive vice-president and cashier of the Tri-State Bank and a member of the Shelby County Democratic Executive Committee. He uses the Memphis Municipal Airport three or four times per year in connection with his business and public office (R. 3, 56-57). Appellant sought service in the main dining room of Dobbs Houses restaurant in the Memphis airport on April 28, 1959, and again on October 29, 1959. On each occasion he was denied service in the main dining room, solely on account of his race and color, by the hostess, but directed to a small room reserved for Negroes. Each time appellant asked to see the manager who advised him that Negroes were served in a separate, small room off to the side. Appellant declined these offers to be served on a racially segregated basis and left the restaurant (R. 23-24, 57).

Jurisdiction of the court below was invoked pursuant to the provisions of Title 28, United States Code, §1343(3). The complaint did not rely upon or seek to enjoin the enforcement of any specified state statute, state regulation or city ordinance. The complaint alleges, *inter alia*, that defendants, acting under color of the laws of Tennessee and ordinances of the City of Memphis, have adopted and presently pursue a policy, practice, custom and usage of segregating Negroes and white persons in the airport restaurant and restroom facilities (R. 3-4). The complaint sought to enjoin the city of Memphis and

the defendant, Dobbs Houses, Inc., the lessee of the city's airport restaurant (R. 2-3), from "making any distinctions based on race or color" in public facilities at the airport, including the restaurant (R. 4).

On April 21, 1961, all appellees filed answers in which they admitted public ownership of the airport, the segregation complained of, and the leasing of the restaurant to Dobbs Houses, Inc. (R. 5-21).

A copy of the lease, evidencing extensive public control over the leased premises, is attached to the City's answer and in paragraph 3 thereof it is provided that:

> 3. Lessee agrees to conduct a first-class cafe and to sell only such articles and wares as are sanitary, wholesome and clean and of the highest character, and agrees not to charge prices higher than those prevailing in the City of Memphis for the same articles. All novelties to be sold upon said premises must first be approved by the Lessor, or its authorized agent. (R. 9.)

This lengthy lease details the city's controls which relate to the use of the premises as an airport restaurant and the city's participation in the profits through a rental arrangement calculated on the basis of a percentage of gross sales (R. 8-17). The city granted this lessee "exclusive" rights (with limited exceptions) to sell food and other items at the airport (R. 10).

In their answers all appellees prayed for the convening of a three-judge court on the ground that the Division of Hotel and Restaurant Inspection had promulgated Regulation No. R-18(L), applicable to Dobbs Houses, pursuant to §53-2121 of the Tennessee Code, violation of which would constitute a misdemeanor punishable by fine under §53-2120 of the Tennessee Code (R. 7, 19-20).

Both appellees relied upon the regulation as justification for the segregation of Negroes in the restaurant and claimed that unless the regulation is declared unconstitutional "by a court of competent jurisdiction and of final review" appellees would consider it a violation of Tennessee law and the lease if separate facilities for the service of Negro and white citizens were not provided (R. 7, 21).

Appellee City of Memphis alleged that "the officials of the City of Memphis conceive it to be their duty to object to desegregation of the races by the defendant Dobbs Houses, Inc. in the airport restaurant, as a violation of the laws of the State of Tennessee, and, therefore, a violation of paragraph 20 of its lease with the City"—in the absence of a declaration of unconstitutionality of the regulation (R. 7).

Appellees, as a first defense, claimed that the complaint failed to state a claim upon which relief could be granted (R. 5, 18).

As a second defense Dobbs Houses alleged that, "As a matter of business practice and in accordance with custom and usage of the area it requires that negro customers be served in an area which is segregated from that in which white customers are served" (R. 19).

The regulation referred to above was its third defense and as a fourth defense it averred, that "it operates a restaurant at the Memphis Municipal Airport as a private facility to which the 14th Amendment does not apply, and that it has a legal right to enforce any rules and policies which it deems desirable in regard to the seating of patrons, including the right to seat and serve patrons in separate areas because of race and color" (R. 20-21). The City concurred (R. 7-8).

After the answers were filed, appellant moved for a summary judgment on May 18, 1960, on the ground that the attached affidavit of appellant and the pleadings showed no genuine issue as to any material fact and appellant was entitled to judgment as a matter of law (R. 21-24).

The motion for summary judgment came on for hearing before a single judge court, Judge Marion S. Boyd, on June 3, 1960. The court first heard argument on the question whether a three-judge court was required. Appellant contended that this case was not properly one for a three-judge court on the ground that there was no substantial constitutional question involved with respect to the regulation (R. 28) and that Section 62-710 is not involved in this case (R. 32). Appellee Dobbs Houses moved in open court for leave to amend their answer to specifically plead Section 62-710 of the Tennessee Code (R. 32). At the close of the hearing the court orally ruled: "This will be a three-judge hearing. And that means the motion for summary judgment is not acted upon, of course, at this time . . ." (R. 35).[5]

[5] On June 4, 1960, appellant's counsel wrote a letter to the chief judge of the Sixth Circuit, advised of the ruling of Judge Boyd on June 3, and requested the chief judge to arrange to have the case heard before the same three-judge court which was to sit in Memphis on June 27, 1961, to hear the case of *Evers* v. *Dwyer*, 358 U. S. 202, a case remanded by this Court for further proceeding consistent with its opinion (R. 41). A letter was addressed on the same date to Judge Boyd pointing out that a three-judge court, of which he was a member, would be sitting on the 27th, and respectfully requested him to take steps to have this case heard at that time (R. 41). On that same date, appellant served a second notice and motion for summary judgment on the Governor and Attorney General of Tennessee, as well as all defendants, putting them on notice that appellant would bring on his motion before a three-judge court on June 27, 1960. The motion was filed on June 6, 1960 (R. 36-37, 45). The three-judge court below, which was the same court which sat on the *Evers* case on June 27, 1960, was appointed by the chief judge of the Circuit by order dated June 9, 1960, but the order was not filed with the Clerk below until June 20, 1960 (R. 46). On June 27, appellant's counsel appeared

Thereafter, the case came on for trial before the court below on November 9, 1960 (R. 47). Neither the Governor nor the Attorney General has appeared, answered, or filed any brief in this case.

Prior to the trial, on November 2, 1960, appellees moved the court for leave to amend their answer to rely on the doctrine of abstention (R. 48-51). These motions were granted at the trial (R. 51-53).

On the trial, appellant testified that in addition to being refused service on April 28, 1959, as alleged in his complaint, he was denied service on October 29, 1959 by the manager of Dobbs Houses (R. 57). Appellees offered no testimony and the case was taken under advisement.

On January 23, 1961, the court rendered a brief per curiam opinion holding that, ". . . the plaintiff's cause herein shall be stayed pending the prosecution of a proper declaratory judgment suit to be brought by the plaintiff in the courts of Tennessee for the purpose of obtaining an interpretation of state statutes, regulations and city ordinances under consideration herein" (R. 89). In so doing, reliance was placed wholly and solely upon this Court's decision in *Harrison* v. *NAACP*, 360 U. S. 167 (R. 88).

Thereafter, an abstention order was entered on February 10, 1961, holding the case in "abeyance pending the filing of such suit and an interpretation of the State statutes involved herein (R. 89-90)."

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in court pursuant to the June 4th notice of motion, but the three-judge court declined to hear the case on the ground that appellees were not ready (R. 42) and on the ground that the case had not been set for hearing by that three-judge court or by the district judge (R. 43).

Notice of Appeal to this Court was filed on March 1, 1961, and the case docketed here on May 1, 1961. On October 9, 1961, this Court entered an order postponing further consideration of the question of jurisdiction until the hearing of the case on the merits and transferred same to the summary docket.

On March 1, 1961, appellant also filed a notice of appeal to the Court of Appeals for the Sixth Circuit; docketed his appeal there on May 25, 1961, pursuant to extension of time order; and on May 26, 1961, moved that court for an order staying all further proceedings on that appeal pending disposition of the instant appeal by this Court, which stay was granted on June 5, 1961.

Summary of Argument

The restaurant in the Memphis Municipal Airport, leased by exclusive franchise to appellee Dobbs Houses, Inc., is a public facility in which discrimination against Negro patrons violates equal protection standards of the Fourteenth Amendment. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715. The facts and law are so clear in this case that the court below lacked discretion to refuse to grant appellant prompt relief. *Union Tool Co.* v. *Wilson*, 259 U. S. 107; *Henry* v. *Greenville Airport Commission*, 284 F. 2d 631 (4th Cir. 1960).

The doctrine of abstention was improperly invoked since no construction placed on the state statutes and regulation in question would have avoided the constitutional issue pleaded and proved. *Harrison* v. *NAACP*, 360 U. S. 167, was improperly relied upon below as justifying abstention under the facts of this case.

The direct appeal of this case, as authorized by Title 28, United States Code, §1253, is proper both because the

court below was properly convened as a statutory three-judge court, since an injunction may have issued on the ground of unconstitutionality of the state regulation and statutes relied upon, *Florida Lime and Avocado Growers Inc.* v. *Jacobsen*, 362 U. S. 73, and because the court below denied appellant's injunction plea in terms similar to other orders reviewed by this Court. *Bryan* v. *Austin*, 354 U. S. 933; *NAACP* v. *Bennett*, 360 U. S. 471. Appealability of an order depends upon its effect rather than its terminology. *Ettleson* v. *Metropolitan L. Ins. Co.*, 317 U. S. 188; *Glen Oaks Utilities, Inc.* v. *City of Houston*, 280 F. 2d 330, 333 (5th Cir. 1960). The legal operation and effect of the order appealed from would be the same even if it had included the word "denied" as in *Gov't & Civic Employees Organization Com.* v. *Windsor*, 347 U. S. 901, aff'g 116 F. Supp. 354 (N. D. Ala. 1953). Non-appealability of the order would necessitate resort to writ of mandamus to require the entry of an order expressly stating that the injunction is denied. Cf. *La Buy* v. *Howes Leather Co.*, 352 U. S. 249.

The direct appeal prerequisites of Section 1253 are also satisfied by applying the doctrine of the line of this Court's decisions which hold that the stay order itself is to be regarded as granting an injunction, since by its substantial effect, it restrains further proceedings in the federal court pending action in the state courts. *Ettleson* v. *Metropolitan L. Ins. Co.*, 317 U. S. 188, 192; *Enelow* v. *New York L. Ins. Co.*, 293 U. S. 379; *Louisiana Power and Light Co.* v. *Thibodaux*, 360 U. S. 25, 26, note 1.

Clearly, a conclusion of non-appealability attributed to the order of the court below would frustrate the congressional intent explicit in § 1253 which makes reviewable by this Court decisions of three-judge courts in cases seeking to enjoin state laws.

I

Appellees' Policy of Racial Segregation in the Municipal Airport Restaurant Constituted State Action of a Nature So Clearly Prohibited by the Fourteenth Amendment That the Court Below Plainly Erred in Denying the Requested Injunction.

Last term, *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, held subject to the equal protection clause of the Fourteenth Amendment a restaurant facility in a municipally owned parking building leased to a private operator. After a review of the lease's terms the majority concluded:

> Addition of all these activities, obligations and responsibilities of the authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. 365 U. S. 715.

Certainly the degree of "participation and involvement" found in the *Burton* case may be found in the lease here. Indeed, the lease between the City of Memphis and Dobbs Houses, Inc. (R. 8-17), suggests that this lessee is virtually an agent of the City. In addition to denoting the leased areas (Par. 1), all of which are publicly owned, and granting the exclusive franchise to sell food, periodicals, and novelties at the Memphis airport (Par. 7) (sufficient in itself to invoke the equal protection clause, see *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960)), the City retained control over what lessee could sell, how much could be charged (Pars. 3, 5, 6), and how prices should be displayed (Par. 9). Twenty-four hours operation daily

was required (Par. 4); and lessee agreed to discharge employees adjudged "reprehensible" by the City's agent (Par. 14). Additional equipment installed by lessee (Par. 15), and location of equipment and vending machines outside of building (Par. 16) was to be approved by the City. Dobbs Houses was not required to pay a fixed rental—rather, the City receives six percent of the gross from all sales except those designated as gift items, on which the City receives 10 percent (Par. 10).

A weighing of these controls, obligations, and mutual benefits on the scale of the *Burton* case, left no room for the court below to avoid the conclusion that "the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." 365 U. S. at 715. See also, *Coke* v. *Atlanta*, 184 F. Supp. 579 (N. D. Ga. 1960); *Derrington* v. *Plummer*, 240 F. 2d 922 (5th Cir. 1956), cert. den. *Casey* v. *Plummer*, 353 U. S. 922, and other cases collected in *Burton*, *supra*, note 2.

The essential facts in this case have never been in dispute, and the law to be applied is clear. Without any question, appellant was entitled to an injunction granting his requested relief. "Legal discretion . . . does not extend to refusal to apply well-settled principles of law to a conceded state of facts." *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 112. See also, *Henry* v. *Greenville Airport Commission*, 284 F. 2d 631 (4th Cir. 1960); *Clemons* v. *Board of Education*, 228 F. 2d 853 (6th Cir. 1956), cert. den. 350 U. S. 853; *Board of Supervisors* v. *Wilson*, 340 U. S. 909, affirming 92 F. Supp. 986 (E. D. La. 1950).

II

The Court Below Erred in Applying the Doctrine of Abstention to the Facts of This Case.

After this case was submitted on the merits, the court below stayed all proceedings pending suit for declaratory judgment by appellant in the state courts for construction of the statutes under consideration.

Appellant does not understand appellees or the court below to claim that the constitutionality of Sections 53-2120 (misdemeanor to fail to comply with regulations of hotel division), and 53-2121 (division authorized to make rules and regulations)[1] is questioned by anyone in this case, or that any party to this case sought to enjoin enforcement of these statutes on constitutional grounds. Dobbs Houses' answer leaves no doubt that, quite apart from the regulation and statutes in question, its own policy is to segregate Negroes in this municipally owned restaurant facility which it has leased.

Consequently, even assuming *arguendo*, that the Tennessee courts should hold that under Section 53-2121 the Division is without power to promulgate a regulation permitting segregation in restaurants, the constitutional question raised by the complaint is not avoided, mooted, or altered in any material way. The question is still whether this lessee's policies are proscribed by the prohibitions of the Fourteenth Amendment.

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[1] Since the order below was entered, Section 53-2121 has been amended, effective February 18, 1961, to read as follows:

> "Rules and regulations authorized—The division is hereby authorized to make such rules and regulations as may be necessary pertaining to the safety and or sanitation of hotels and restaurants in order to carry out the provisions of this chapter."

Regulation No. R-18 (L), violation of which is a misdemeanor under §53-2120, provides as follows:

> Restaurants catering to both white and negro patrons *should* be arranged so that each race is properly segregated. Segregation will be considered proper where each race shall have separate entrances and separate facilities of every kind necessary to prevent patrons of the different races coming in contact with the other in entering, being served, or at any other time until they leave the premises. (Emphasis added.)[5]

The Division's first regulation, Regulation R-1, defines terms used in the regulations:

"Definition of Terms.

* * * * *

(d) The term 'shall' as used in these regulations is mandatory.

(e) The term 'should' as used in these regulations indicates desirability.

* * * * *"

In the light of these definitions, restaurant segregation is clearly not mandatory. The construction of Section 53-2120 by the Tennessee courts is therefore not necessary to a determination of the constitutional question presented because if Dobbs Houses does not segregate, either as a matter of volition or under court compulsion, it is shielded by the nonsegregation option which the regulation affords.

However, since Dobbs Houses has elected to stand on the regulation as justification for its segregation, the question

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[5] Tennessee Laws, Rules and Regulations for Restaurants, Department of Conservation, Division of Hotel and Restaurant Inspection. Approved June 18, 1952, filed in Office of Secretary of State.

remains whether there is necessity for the Tennessee courts to construe this regulation to avoid premature constitutional adjudication. Plainly, there is no justification for invoking abstention with respect to this regulation since no construction can make it constitutionally palatable. Appellant can find no authority whatsoever for the proposition that, where a state policy is clearly and unavoidably unconstitutional on its face, comity dictates that state courts be allowed the privilege of a prior declaration to this effect. Such a requirement would not be abstention but a patent abdication of the duty imposed upon federal courts.

Regulation No. R-18 (L) which permits segregation in a municipally owned restaurant leased to a private corporation to operate as a first class cafe for the benefit of the public using the airport is void on its face. *Brown* v. *Board of Education of Topeka*, 347 U. S. 483 (1954) (Kansas had a permissive school segregation statute); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Muir* v. *Louisville Park Theatrical Association*, 347 U. S. 971, vacating and remanding, 207 F. 2d 275 (6th Cir. 1953). See *Cooper* v. *Aaron*, 358 U. S. 1, 19 (1958). Moreover, if the Tennessee courts should hold the regulation inapplicable to Dobbs Houses, the constitutional question again remains the same in view of the position taken by Dobbs Houses. Dobbs Houses also elected to rely upon §62-710 of the Tennessee Code which abrogated the common law rule giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement. If the Tennessee courts should hold that this statute furnishes Dobbs Houses the legal foundation for discrimination against Negroes, the constitutional question remains unchanged. Cf. *Burton* v. *Wilmington Parking Authority, supra* (concurring and dissenting opinions). If the Tennessee courts should hold that this statute does not

apply to restaurants, contrary to what appears to be the clear intent or purpose of this statute passed in 1875 to counteract the supposed effects of the Civil Rights Act of 1875,* see *State* v. *Lasater*, 68 Tenn. 584 (1877), the posture of the constitutional question here is the same.

No abstention principle is more firmly established than this Court's repeated pronouncement that federal courts must postpone the exercise of jurisdiction in the face of a federal constitutional issue when it appears the issue might be avoided, mooted or presented in a different posture by a state court determination of pertinent state law. *Clay* v. *Sun Insurance Co.*, 363 U. S. 207; *Louisiana Power & Light Co.* v. *Thibodaux*, 360 U. S. 25; *Harrison* v. *NAACP*, 360 U. S. 167; *Martin* v. *Creasy*, 360 U. S. 219; *R.R. Comm. of Texas* v. *Pullman Co.*, 312 U. S. 496; see, *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185, 189.

In *Harrison* v. *NAACP*, *supra*, the sole case relied on below, this Court held that abstention was justified with respect to the three statutes involved in that appeal since this Court was unable to agree on the terms of those statutes left "no reasonable room for construction by the Virginia courts which might avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of the problem." (At p. 177.)

But as demonstrated above, there is no construction which the Tennessee courts could give to the statutes and regulations relied on by appellees which would obviate the necessity for deciding the constitutional issue. The instant case, therefore, is not in the same category with the *Harrison* case.

If consideration is given the other principles underlying this Court's development and extension of the doctrine of

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* 18 Stat. at L. 335.

abstention, it is likewise clear that none of these is applicable here. This Court has required District Courts to postpone exercise of jurisdiction where the exercise of that jurisdiction would interfere with a state's administrative processes, *Burford* v. *Sun Oil Co.*, 319 U. S. 315 and *Pennsylvania* v. *Williams*, 294 U. S. 179, or collide with the state's right to collect taxes, *Toomer* v. *Witsell*, 334 U. S. 385, 392 and *Great Lakes Dredge and Dock Co.* v. *Huffman*, 319 U. S. 293, or result in needless friction by unnecessarily enjoining state officers from executing state policy concerned with matters of wholly local concern. *Alabama Public Service Commission* v. *Southern Railroad Co.*, 341 U. S. 341. All of these reasons for abstention have been based upon comity. See, *County of Allegheny* v. *Frank Mashuda Co.*, *supra*, at 189.

More recently, this Court has required abstention where, in addition to all of the foregoing reasons, the case involves "complex and varying effects" on individual situations involved, *Martin* v. *Creasy*, *supra*, or where the problem involved "is intimately related to state sovereignty" and the state law question may be decisive of the issues touching upon the relationship of city to state. *Louisiana Power & Light Co.* v. *Thibodaux*, *supra*.

None of the above considerations is involved here. Controlling here is this Court's recent admonition that abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *County of Allegheny* v. *Frank Mashuda Co.*, *supra*, at pages 188-189. No reason to invoke the narrow exception is presented by the facts or the law herein.

Indeed, the order directing appellant here to the state court for declaratory judgment served no apparent purpose but frustration of constitutional rights long denied.

III

This Action Is One Required by Title 28 U. S. C., Section 2281 to Be Heard by a District Court of Three Judges and This Court Has Jurisdiction of This Direct Appeal Under Title 28 U. S. C., Section 1253.

A. This case meets the requirements for the convening of a three-judge district court which is required for the granting of:

> "... an interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, ... upon the ground of the unconstitutionality of such statute ..."

This is such an action. The term "statute" comprehends administrative orders as well as state legislative enactments provided they are of state-wide application. *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U. S. 73, 74, *McLaurin* v. *Oklahoma State Regents*, 337 U. S. 637.

Section 62-710, Tenn. Code Ann., Vol. 9 and Regulation No. R-18 (L), set out above at page 3, were raised as defenses to appellant's allegation that appellees, acting under color of the laws of Tennessee, had adopted and were enforcing a policy, practice, custom and usage of segregating Negroes and whites in the airport restaurant. Both the statute and the rule have statewide application.

Appellees' claim is that the statute and regulation authorized the challenged discrimination and were constitutional until declared otherwise by a court of final review (R. 7-8, 19-20, 38). They thus interposed the state policy evidenced in the regulation against a claim of unconstitutional state action raised by the face of the complaint. It therefore clearly appeared from the complaint and answer that there was involved here an effort to bring about "statewide doom by a federal court of a state's legislative policy," *Phillips* v. *United States*, 312 U. S. 246, 251. So that this doom would not be brought about in an "improvident" manner, *Ibid.*, three judges were summoned.

In the *Florida Lime and Avocado* case, *supra*, this Court ruled:

> Section 2281 seems rather plainly to indicate a congressional intention to require an application for an injunction to be heard and determined by a court of three judges in *any* case in which the injunction may be granted on grounds of federal unconstitutionality. (At p. 571.)

This action also involves "restraining the action of . . . [an] officer of such state." See *Cleveland* v. *United States*, 323 U. S. 329 (1945), where local officials were held to be officers of the state when enforcing state-wide policy; *Browder* v. *Gayle*, 142 F. Supp. 707 (1956) (D. C. Ala.) aff'd *per curiam*, 352 U. S. 903, where bus drivers were held to be officers of the state in that they had the authority to enforce state policy; *Spielman Motor Sales* v. *Dodge*, 295 U. S. 89, 94 (1935).[7] Appellee City of Memphis could only

[7] "Where a statute embodies a policy of statewide concern, an officer, although chosen in a political subdivision and acting within that limited territory, may be charged with the duty of enforcing the statute in the interest of the State and not simply in the interest of the locality where he serves."

be restrained by an injunction against its officers. Municipal officers, of course, may be considered state officers for purposes of three-judge court jurisdiction when they enforce statewide policy, *Ibid.* Moreover, Dobbs Houses, Inc., as lessee of city property on which it is operating a public accommodation also is an agency of the state within the contemplation of this Court's decisions construing the Fourteenth Amendment's restraints. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961).

That the statute and administrative order were raised by way of defense rather than by way of complaint is of no consequence because the purpose of §§2281 to 2284 is to prevent improvident statewide doom by a federal court of a state's legislative policy. If this were not the rule then statewide policy could be brought before a one-judge court at any time at the choice of the plaintiff who could elect to sue the person enforcing the policy to enjoin his conduct rather than in terms seeking to enjoin his application of a statute. It is incredible, for example, that the school segregation cases, *Brown* v. *Board of Education*, 347 U. S. 483, could properly have been heard before a one-judge court merely at the option of plaintiffs who without mentioning state segregation laws could sue an elementary school principal for his conduct in excluding a Negro child although such a principal was, in fact, acting pursuant to the mandate of state statute. Since congressional policy is that statewide policy as expressed in statutes and administrative orders of statewide application should receive the mature consideration of three judges, rather than one, and should be amenable to speedy review by this Court, it would be a serious blow to the congressional scheme if the forum were determined by such tactical considerations. Therefore, this Court has held that the jurisdictional scheme requires that jurisdiction of a three-judge court

may not be defeated by the failure of plaintiffs to pray for it where the case involves a statute which could be enjoined upon the ground of unconstitutionality even though the law might be raised by defendant in his answer, *Lambert Run Coal Co.* v. *Baltimore & O. R. Co.*, 258 U. S. 377, 382.

That a statutory scheme provides an option to segregate rather than an inflexible requirement makes no difference for three-judge court jurisdiction because schemes of this sort fall also under §§2281-2284. Indeed, *Brown* v. *Board of Education of Topeka*, 347 U. S. 489, itself, involved an optional segregation statute.

That the unconstitutionality of defendants' action taken under the statutes and regulation and otherwise is patent does not obviate the need for a three-judge court. Section 2281 is clear in stating that no injunction of the kind sought here shall "be granted . . . upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges. . . ." *Ex parte Poresky*, 290 U. S. 30, a pronouncement by this Court on the effect of the substantiality of the constitutional question on the operation of §2281 et seq. is not to the contrary. *Poresky* was a case where the injunction was denied, not granted.

Appellant recognizes that a number of district courts have granted injunctions against the enforcement of obviously unconstitutional state segregation statutes while sitting as single judge courts. See *Gray* v. *Board of Trustees of the University of Tennessee*, 100 F. Supp. 113 (E. D. Tenn. 1951) dismissed as moot, 342 U. S. 517, and see discussion of this point in *Davis* v. *County School Board*, 142 F. Supp. 616, 617 (D. C. Va. 1956); *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 336, mandamus den. 351 U. S. 948, aff'd 242 F. 2d 156 (5th Cir.) cert. denied 354 U. S. 921. And see cases collected in Anno:

Three-Judge Court, 4 L. ed. 2d 1931, 1958, Note 1. The policy considerations in terms of efficient judicial administration suggested by these decisions are perhaps best expressed by *Phillips* v. *United States*, 312 U. S. 246, 250, 251, in which Mr. Justice Frankfurter pointed out that the requirement of three judges "entails a serious drain upon federal judicial system" and that the appealability of three judge court orders directly to this Court places a strain upon the docket of this Court. It may be, therefore, that notwithstanding the language of 2281-2284, this Court appropriately might construe the three judge court act to permit a single judge district court to enjoin the enforcement of a clearly unconstitutional statute as suggested in the segregation suits cited above. On the other hand, while single judge action in such cases may be permissible for reasons of sound judicial administration, where three judges actually do take jurisdiction in a case involving an injunction against the enforcement of a state statute based on its constitutionality such jurisdiction properly has attached under the very terms and policy of §§2281-2284. It would be a much heavier burden on the federal judiciary for such a case to be subject to multiple reviews, first in this Court, then in the Court of Appeals and then once more in this Court. For, if this Court now determines that the case was cognizable by one judge and one judge only, appellant would then have to pursue his appeal before the Sixth Circuit whose judgment would be reviewable here on the merits. Appellant's position therefore, is this: The case falls within the language and policy of §§2281-2284. As such, three judges who took and exercised jurisdiction lawfully possessed such jurisdiction and the cause is appealable directly to this Court. Although an alternative construction of §§2281-2284 might justify—in the light of pressing problems of judicial administration—a single judge entering an injunction against the segre-

gation here complained of, once three judges took jurisdiction of the case it was properly theirs and is appropriately reviewable here.

B. Title 28, United States Code, 1253 provides for direct appeal by any party to this Court:

> "... from any order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

In this case, after due notice, there was a hearing before a district court of three judges on appellant's prayer for a permanent injunction which appellees claimed and the court below agreed involved state statutes which the court might be required to enjoin (R. 4, 7, 53-62).

Thus, the requirements of Section 1253 were met in this case when the three-judge court below held a hearing on the merits of appellant's claim for injunctive relief, which involved the claim of constitutionality of alleged applicable state statutes, heard all the evidence of the parties and, after the hearing, issued a major order which, in actual operation and effect, either granted or denied the injunction sought.

The order entered here which effectively denied the relief requested provides *inter alia*,

> "It Is, Therefore, Ordered, Adjudged and Decreed, that said Cause be and the same is hereby held in abeyance pending the filing of such suit for interpretation of the State statutes involved herein" (R. 90).

It is clear from prior decisions of this Court in reviewing similar orders that such orders are appealable under Section 1253. In *Bryan* v. *Austin*, 354 U. S. 933, this Court took jurisdiction of and vacated a similar order.[8] Likewise, in *NAACP* v. *Bennett*, 360 U. S. 471, this Court vacated a similar order and remanded the case.[9]

There appears to be no question that stay orders issued by three-judge courts applying abstention where injunctive relief is sought are directly appealable to this Court. *Gov't & Civic Employees Organization Com.* v. *Windsor*, 347 U. S. 901, aff'g 116 F. Supp. 354 (N. D. Ala. 1953) (Order reprinted at 146 F. Supp. 214, 215).

The only stay orders issued by three-judge courts which may not be appealable are those issued pursuant to Title 28, §2284 requiring a stay in those instances where the state has agreed to stay statutes attacked as unconstitutional pending its own state court test. Also, stay orders which are merely a procedural step in the nature of a short continuance, stemming from the inherent power of a District

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[8] The Order in the *Bryan* case, which is on file in this Court, No. 931, October Term 1956 provided:

"... it is ordered that the case be retained and remain pending upon the docket but that proceedings therein be stayed to permit the plaintiffs a reasonable time for the exhaustion of state administrative and judicial remedies, after which such further proceedings, if any, will be had by this court as may then appear proper in the premises." (Jurisdictional Statement, p. 43a.)

[9] The Order in the *Bennett* case is on file in this Court as No. 757, October Term 1958, and it provided:

"On this day, pursuant to the opinion of the Court rendered by Judge Sanborn, it is ORDERED, That the motion for a stay of proceedings filed herein by the defendant, Bruce Bennett, Attorney General of the State of Arkansas, and joined in by certain other defendants, be, and the same is, granted, and that this Court will retain jurisdiction of this cause until efforts to obtain an appropriate adjudication in the state courts have been exhausted."

Court to control the progress of a cause likewise may not be reviewable. *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379.

While the order of the court below does not use the words "injunction denied", the order in actual operation and effect denies the injunctive relief sought, and, instead of relief, stays the action indefinitely until appellant is able to obtain from the courts of Tennessee a declaratory judgment interpreting the questioned state statutes. There is no indication in the order that appellant's injunction request is still under advisement. Rather, the court's order leaves no doubt that no further proceedings will be had until there has been a state court construction (R. 89).

Logically and properly, whether "an order is subject to appeal depends upon its effect, rather than its terminology." *Glen Oaks Utilities, Inc.* v. *City of Houston*, 280 F. 2d 330, 333 (5th Cir. 1960); *Ettleson* v. *Metropolitan L. Ins. Co.*, 317 U. S. 188.

While the order in *Windsor*, *supra*, which was affirmed here, did recite that "the final relief for which plaintiffs prayed in their complaint is hereby denied", before reciting that jurisdiction was retained pending state court construction of the statute, it is obvious that the actual legal operation and effect of that order was the same as the effect of the abstention orders in the *Bryan* case, *supra*, the *Bennett* case, *supra*, and in the instant case.

A contrary view of the nature of such orders—that is, one which views the trial court as not having "denied" the demand for injunctive relief—would require appellant to seek an extraordinary writ of mandamus requiring the court below to enter an order expressly stating that it did deny the injunction. That such relief would be available if needed seems plain from the rationale of both the

majority and dissenting opinions in *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, where the Court approved a writ of mandamus issued to compel a trial judge to vacate an order of reference to a master. Without some such alternative remedy a trial court order refusing to grant an injunction would become beyond this Court's jurisdiction to review by simply not reciting that it was an order of denial. The All Writs Act, however, was plainly designed to provide a remedy against such a situation.

There is, of course, an alternative theory of appealability applicable here. Under the doctrine of *Ettleson* v. *Metropolitan L. Ins. Co.*, 317 U. S. 188, 192; *Enelow* v. *New York L. Ins. Co.*, 293 U. S. 379, and *Louisiana Power and Light Co.* v. *Thibodaux*, 360 U. S. 25, 26, note 1, if even limited effect is given to the abolition of the old distinction between law and equity (Rule 1, Federal Rules of Civil Procedure), the stay order may itself be regarded as an injunction which by its substantial effect restrains further proceedings in the federal court pending the action in the state courts. Indeed, if the stay order in this case is held to be neither a denial of an injunction requested nor an injunction itself, and thus unappealable, the case law will have created the following incredible and unconscionable anomaly: Appeals would be allowed from stay orders in law actions (where no injunction was sought) on the fiction that a stay is an injunction against further proceedings in the court issuing it (as in the *Thibodaux* case); but appeals would not be allowed from stay orders issued in suits where an injunction is actually sought and not granted pending state court action merely because the court staying the case chooses not to use the words "injunction denied" in its order. See *Glen Oaks Utilities, Inc.* v. *City of Houston*, 280 F. 2d 330 (5th Cir. 1960). If the "substantial effect" principle in appraising judgments is to be applied

in aid of a fiction as in *Ettleson, supra*, 317 U. S. at 192, it should also be applied here in aid of reality.

The action of the court below was in fact a denial of injunctive relief; it should therefore be regarded as a denial in law under §1253. *Bryan* v. *Austin, supra*, *NAACP* v. *Bennett, supra*, *Glen Oaks Utilities* v. *City of Houston, supra*. Cf. *Govt. & Civic Employees Organizing Com.* v. *Windsor, supra*.

Finally and fundamentally, the plain purpose of Congress in enacting §1253 was to make consequential decisions of three-judge courts reviewable on direct appeal to this Court. The Congressional purpose was to insure that decisions disposing of the important and special class of cases where three-judge courts are required could be directly and promptly appealed to this Court. This purpose was carried out by §1253 which allows appeals from orders granting or denying temporary or permanent injunctions since applications for such injunctions are present in all cases where three-judge courts are required under 28 U. S. C., §§2281 and 2282. A rule that stay orders issued in the context of the judicially created equitable abstention doctrine are not reviewable would frustrate the Congressional plan of making the decisions of the three-judge courts on requests to enjoin state laws reviewable by this Court.

CONCLUSION

It is, therefore, respectfully requested that this Court vacate the order of the court below and direct that court to enter an injunction granting appellant the relief prayed for in the complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of December, 1961, I mailed a copy of Appellant's Brief to the following attorneys for the City of Memphis and Dobbs Houses, Inc., by sending a true copy of same to them via regular United States Airmail, Special Delivery, postage prepaid:

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